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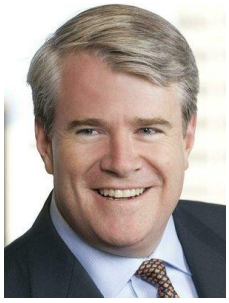
Nonstatutory Labor Antitrust Exemption Risk In Sports Unions

By **Chris Yates, Anna Rathbun and Jesse Vella** (December 5, 2022, 4:07 PM EST)



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The recent rise of new professional sports leagues, players' associations and the formation of unions in many other industries means there will be increased focus on the nonstatutory labor exemption to the antitrust laws.

For example, newly launched or relaunched leagues such as United Women's Soccer and the XFL have standards for entry and employment but do not yet have a players' union or collective bargaining agreements, or CBAs.[1]

Understanding the potential antitrust exposure associated with navigating employment issues and negotiating with unions is critical for employers, particularly when CBA negotiations can last several years.

Although there are many multiemployer groups that enter into collective bargaining negotiations with employee unions, the nonstatutory labor exemption is extremely important for sports leagues.

Without collaboration between owners and players' associations through the collective bargaining process, sports leagues may face antitrust liability for implementing a wide range of standards and rules critical to the success of the league and its players alike.

However, the law is unsettled as to whether the exemption applies to agreements between multiemployer groups and/or a union after the union is recognized, but before a formal, comprehensive CBA is reached.

This gap in the law can allow individuals to circumvent a union and bring antitrust claims during the bargaining period, in which employers are barred from unilaterally modifying important terms and conditions of employment. Such circumvention is harmful to not only a multiemployer bargaining unit, but also to the union.

The Nonstatutory Labor Exemption

One bedrock principle of federal labor law is that after recognition of a union, the employer or multiemployer group may no longer unilaterally change mandatory terms and conditions of employment without negotiating with the union.[2]

Mandatory bargaining subjects can vary by industry but include wages, the hours and days of the week on which employees are required to work, holidays and paid vacations, health insurance plans, physical exams, layoffs, employment eligibility, and other work rules.

As the U.S. Court of Appeals for the D.C. Circuit acknowledged in Brown v. Pro Football Inc. in 1995, "[t]he inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime."[3]

The collective bargaining process is so important that the law recognizes that employers and employees should not face antitrust liability for the kind of coordinated activity that the collective bargaining process requires.[4]

To promote labor unions and protect the collective bargaining process, courts recognize a nonstatutory labor exemption to the antitrust laws that protects the collective bargaining process from antitrust claims.

Specifically, an agreement that is alleged to restrain trade is shielded from antitrust liability if it primarily affects the parties to the agreement; concerns a condition of employment that is a mandatory subject of collective bargaining; and is the result of bona fide, arm's length collective bargaining.[5]

The nonstatutory exemption derives from federal labor statutes, which delegate authority to the National Labor Relations Board and seek to promote collective bargaining and good faith coordination of wages, hours and working conditions.[6] Without an antitrust exemption, meaningful collective bargaining could be chilled altogether.[7]

The U.S. Supreme Court explicitly recognized, in California ex rel. Harris v. Safeway Inc. in 2011, that the nonstatutory exemption does not only apply to a final agreement between an employer and the union, but importantly the exemption protects the collective bargaining process as a whole, including before an initial collective bargaining agreement is approved and for a period after the agreement expires.[8]

Protection of the collective bargaining process:

- Helps promote voluntary recognition agreements between the employer and the union;
- Allows negotiations to proceed without the distraction and cost of antitrust litigation;
- Prevents opportunistic behavior by individuals who seek to be treated differently from union members; and
- Prevents antitrust litigation from undermining the union's ability to negotiate as the exclusive bargaining unit for union members.

Application of the Exemption Outside of CBAs

In light of the importance of collective bargaining negotiations in and of themselves, it is not surprising that courts have indicated the nonstatutory exemption insulates multiemployer groups from antitrust scrutiny agreements and restraints of trade that are not explicitly contained in a CBA.[9]

For example, in Clarett v. National Football League, a football player alleged that the NFL's draft

eligibility rules, which prevented a player from entering the draft until three football seasons after high school, violated Section 1 of the Sherman Act.[10]

The eligibility rules were not originally part of a formal CBA between the NFL and the players' association but, rather, were contained in the NFL Constitution and bylaws, which had been promulgated by the NFL in the 1920s.[11]

In 2003, the NFL relaxed the eligibility requirement through its bylaws.[12] Maurice Clarett filed his claim shortly thereafter, arguing that the nonstatutory exemption could not apply because the eligibility requirement had not been the result of labor bargaining.[13]

Justice Sonia Sotomayor, then writing for the U.S. Court of Appeals for the Second Circuit, disagreed, noting that such a holding:
Would completely contradict prior decisions recognizing that the labor law policies that warrant withholding antitrust scrutiny ... extend as far as necessary to ensure the successful operation of the collective bargaining process and to safeguard the "unique bundle of compromises" reached by the NFL and the players union as a means of settling their differences.[14]

Courts have also suggested that the nonstatutory exemption applies as soon as an exclusive bargaining representative has been selected.

For example, in Caldwell v. American Basketball Association Inc., a former ABA player and president of the ABA Players Association alleged that the ABA and his former team combined and conspired to blacklist him and deprive him of the opportunity to continue his career, and that they attempted to monopolize the market for professional basketball services when Caldwell was suspended and then never asked to play professional basketball again.[15]

The U.S. District Court for the Southern District of New York dismissed Caldwell's antitrust claims in 1993 as barred by the nonstatutory labor exemption. In affirming the district court's dismissal in 1995, the Second Circuit explained that as soon as a bargaining representative is selected, the bargaining process is governed by "a 'soup-to-nuts array' of rules, tribunals and remedies" that governs the collective bargaining process.[16]

After this selection, parties are required to jointly discuss, and hopefully agree upon, mandatory subjects of bargaining such as the circumstances under which an employer may discharge or refuse to hire an employee.[17]

Accordingly, the court held that as soon as the ABA recognized the ABA Players Association, ABA teams were exempt from antitrust liability based on competition between individual teams for players represented by the union.[18] The court reasoned that, otherwise, individual players could bring antitrust suits against the league, circumventing labor laws.[19]

The Supreme Court, in Brown v. Pro Football Inc., also articulated the need for the exemption to apply to an agreement not expressly contained in a CBA.

Notably, the Supreme Court refused to limit the application of the exemption to understandings embodied in labor-management agreements, because allowing the exemption to rest upon labor-management consent would expose to antitrust liability "clearly exempt" components of the collective bargaining process, such as joint employer preparation and bargaining.[20]

Yet, the Brown court left open the possibility that certain agreements among multiemployer groups during the collective bargaining process should not be insulated from antitrust review — that an agreement among employers "could be sufficiently distant in time and in circumstances from the collective bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process."[21]

The U.S. District Court for the District of Oregon took a different approach last year in O.M. by and through Moultrie v. National Women's Soccer League.[22]

In Moultrie, the National Women's Soccer League promulgated an eligibility requirement, which required all players in the league to be at least 18 years old, long before the NWSL players' union existed.[23]

After the NWSL Players Association was formed and the NWSL recognized the NWSL Players Association as the exclusive bargaining agent of the NWSL players, the NWSL and NWSL Players Association signed a voluntary recognition agreement, which permitted the NWSL to unilaterally change and establish rules concerning the drafting and trading of players during the pre-bargaining period.[24]

The plaintiff, a 15-year-old soccer player, challenged the eligibility requirement as an anticompetitive agreement between NWSL teams and moved for a temporary restraining order and preliminary injunction enjoining the NWSL from enforcing the age rule, which the court granted.

Contrary to holdings in Brown, Clarett and Caldwell, among other cases,[25] the court held that the nonstatutory exemption did not apply to the age requirement, despite NWSL's recognition of the NWSL Players Association as an exclusive bargaining agent and the commencement of negotiations for a CBA.[26]

The court took issue with the fact that the age rule was "created before the recognition of a union," and noted that extending the nonstatutory exemption to the age rule "would mean that employers could fully insulate themselves from antitrust scrutiny by simply recognizing a union and commencing the (often years-long) collective bargaining process."[27]

The court also found that the voluntary recognition agreement entered into between the NWSL and the NWSL Players Association was not "the result of collective bargaining negotiations" that would safeguard the age rule, because negotiations for a formal CBA had not begun when the voluntary recognition agreement was signed.[28]

The Future of the Nonstatutory Exemption for Newly Formed Leagues or Unions

Given the increased focus on union organizing across all industries, leagues and other multiemployer groups should be mindful of the unresolved breadth of the nonstatutory labor exemption as they navigate a rapidly changing legal landscape.

Recent case law leaves open the question of precisely when the nonstatutory labor exemption attaches, and to which agreements it applies, before the parties agree to a comprehensive CBA. These open questions must be resolved.

As the Second Circuit explained in Clarett v. NFL, preliminary terms and conditions of employment —

and other mandatory subjects of bargaining — serve the "important purpose of allowing the teams to establish and demand uniformity in the rules necessary for the proper functioning of the sport."[29]

After a players' union is formed, and employers may not unilaterally change terms and conditions of employment, implementation of those terms and conditions should not raise the specter of antitrust liability.

At minimum, it behooves leagues and other multiemployer groups to be mindful of the unresolved application of the nonstatutory labor exemption to pre-CBA agreements.

Moreover, multiemployer bargaining units should consider the potential benefit to recognizing a union as an exclusive bargaining agent and commencing negotiations — because pre-CBA agreements regarding mandatory subjects of bargaining become regulated by an array of rules and remedies provided by the National Labor Relations Act, they may be more likely to trigger the nonstatutory labor exemption to antitrust law.

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Disclosure: Latham represented the defendant in Moultrie v. National Women's Soccer League, and Yates advised on the matter.

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[1] The United Football Players' Association, which is composed of football players with experience in football leagues including the XFL, but is not a union recognized by the NLRB, announced its affiliation with the United Steelworkers. See USW, football players team up, USW (Feb. 3, 2022), available at https://m.usw.org/news/media-center/articles/2022/usw-football-players-team-up. However, to date, there are no public reports that the XFL has recognized USW as the XFL players' union.

The NFL and XFL have recently reached a partnership agreement which "will give the NFL a 'petri dish' to experiment with proposed rules, test new equipment and develop prospective officials and coaches." XFL to be 'petri dish' for football innovation, prospect development as part of partnership agreement with NFL, ESPN (Feb. 21, 2022), available at https://www.espn.com/nfl/story/_/id/33341262/xfl-petri-dish-football-innovation-prospect-development-part-partnership-agreement-nfl. Agreements like these, which may impact XFL terms and conditions of employment (including player sharing, a topic not currently addressed in the NFL-XFL partnership), are of the type that might be vulnerable to antitrust liability.

[2] NLRB v. Katz, 369 U.S. 736, 743 (1962).

[3] Brown v. Pro Football, Inc., 50 F.3d 1041, 1054 (D.C. Cir. 1995); see also Clarett v. National Football League, 369 F.3d 124, 138 (2d Cir. 2004); Caldwell v. American Basketball Ass'n, Inc., 66 F.3d 523, 527 (2d Cir. 1995).

[4] Clarett, 369 F.3d at 130 (noting that "certain concerted activity among and between labor and employers must be held to be beyond the reach of the antitrust laws.").

[5] See Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976); Surf City Steel, Inc. v. International Longshore and Warehouse Union, 780 Fed. Appx. 467, 472 (9th Cir. 2019).

[6] Brown, 518 U.S. at 236.

[7] Id. at 237.

[8] California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1128 (9th Cir. 2011) (citing Brown, 518 U.S. at 243).

[9] Brown, 518 U.S. at 243 ("Nor do we see how an exemption limited by petitioners' principle of labor-management consent could work. One cannot mean the principle literally—that the exemption applies only to understandings embodied in a collective bargaining agreement—for the collective bargaining process may take place before the making of any agreement or after an agreement has expired."); Int'l Longshore & Warehouse Union v. ICTSI Oregon, Inc., 863 F.3d 1178, 1189 (9th Cir. 2017) ("The non-statutory exemption shields collective bargaining agreements and actions related to collective bargaining from antitrust liability"); see also Clarett, 369 F.3d at 142-43.

[10] Clarett, 369 F.3d at 126.

[11] Id. at 126-27.

[12] Id. at 128.

[13] Id. at 142.

[14] Id. at 142-143; see also McCourt v. California Sports, Inc., 600 F.2d 1193, 1200 (6th Cir. 1979) (holding the reserve system proposed by league and ultimately adopted with no change was entitled to non-statutory exemption—i.e., "[t]hat the position of one party on an issue prevails unchanged does not mandate the conclusion that there was no collective bargaining over the issue").

[15] 66 F. 3d at 525-26 (2d Cir. 1995).

[16] Id. at 529.

[17] Id. (explaining "[a]n employer's refusal to bargain in good faith over a proposed restriction on the right to hire and fire is an unfair labor practice that the NLRB is empowered to adjudicate and to remedy").

[18] Id. at 530; see also Clarett, 369 F.3d at 138 ("[T]he inception of a collective bargaining relationship between the NFL and its players union some thirty years ago irrevocably altered the governing legal regime." (internal quotation and citation omitted)).

[19] Id. at 530.

[20] Brown, 518 U.S. at 243 (citing Areeda & Hovencamp, Antitrust Law ¶ 229'd, at 277).

[21] Id. at 250.

[22] 541 F. Supp. 3d. 1171 (D. Oregon. May 24, 2021) ("Moultrie TRO").

[23] Id. at 1183.

[24] Id. at 1182-83; O.M. by and through Moultrie v. National Women's Soccer League, 544 F. Supp. 3d. 1063, 1076 (D. Oregon. Jun. 17, 2021) ("Moultrie PI").

[25] See, e.g., Safeway, 651 F.3d at 1128 (exemption "appl[ies] not just to the completed bargain but also to the process by which the bargain is made, including the process before an initial collectivebargaining agreement is approved"); Zimmerman v. National Football League, 632 F. Supp. 398, 407 n.9 (D.D.C. 1986) (because "collective bargaining is an ongoing process," the exemption "does not only apply to formal collective bargaining agreements," but encompasses all "bona fide, arm's-length bargaining . . . outside of formal negotiations on a comprehensive agreement").

[26] Moultrie TRO, 541 F. Supp. 3d. at 1182-83.

[27] Id. at 1182.

[28] Id. at 1183; Moultrie PI, 544 F. Supp. 3d. at 1076 ("The mere existence of an agreement outlining the process through which collective bargaining might begin in the future does not insulate the Age Rule from §1 scrutiny.").

[29] Clarett, 369 F.3d at 136.